

**ARMED FORCES TRIBUNAL, REGIONAL BENCH,
LUCKNOW**

Original Application No 1124 of 2022

Friday, this the 21st day of April, 2023

“Hon’ble Mr. Justice Ravindra Nath Kakkar, Member (J)”
“Hon’ble Vice Admiral Atul Kumar Jain, Member (A)”

EX WOKameshwer Nath Rai, (No: 623991-R) S/o Late Shri Surya Nath Rai, Presently residing at : Village & PO : Reotipur Patty Hansaraj, Distt: Ghazipur, Uttar Pradesh – 232328.

-----Applicant

Ld. Counsel for the Applicant: **Shri Vinay Pandey, Advocate**
Shri Ved Prakash, Advocate
Shri Devendra Kumar,
Advocate

Versus

1. Union of India, Through the Secretary, Ministry of DefenceDHQ PO, New Delhi - 110011.
2. Chief of Air Staff, Air HQ (Vayu Bhawan) Rafi Marg, New Delhi.
3. Dte of Air Veterans, Air HQS SMC Buildings (First Floor)Subroto Park New Delhi - 110010.
4. JCDA Subroto Park New Delhi 110010.

..... Respondents

Ld. Counsel for the Respondents : **Shri Anurag Mishra,**
Central Govt. Counsel.

ORDER(ORAL)

“Per Hon’ble Mr.JusticeRavindra Nath Kakkar, Member (J)”

1. The instant Original Application has been filed on behalf of the applicant under Section 14 of the Armed Forces Tribunal Act, 2007 for the following reliefs:-

“(a) Quash impugned letter No. Air HQ 99798/1/623991/04/16/DAV(DP/RMB) dated 29.10.2015.

(b) Direct the Respondents to grant disability element of pension duly rounded off to 50% w.e.f his date of discharge i.e. 01.05.2016.

(c) Direct respondents to pay the due arrears of disability element with interest @ 12% p.a. from the date of retirement with all the consequential benefits.

(d) Any other relief which the Hon’ble Tribunal may deem fit and proper in the fact and circumstances of the case along with cost of the application in favour of the applicant and against the respondents.”

2. Briefly stated, applicant was enrolled in the Indian Air Force on 25.05.1979 and discharged on 30.04.2016 (AN) in Low Medical Category on fulfilling the conditions of his enrolment. At the time of discharge from service, the Release Medical Board (RMB) assessed his disabilities (i) **‘PRIMARY HYPERTENSION (I-10.0.Z-09.0)’**

@30% for life and (ii) '**DIABETES MELLITUS TYPE-II-OLD (E11.0, Z-09.0)**' @20% for composite disabilities @40%for life and opined the disabilities to be neither attributable to nor aggravated (NANA) by service. The applicant's claim for grant of disability pension was rejected vide letter dated 29.10.2015. Applicant preferred legal notice dated 20.07.2021 which has not been replied by the respondents. It is in this perspective that the applicant has preferred the present Original Application.

3. Learned Counsel for the applicant pleaded that at the time of enrolment, the applicant was found mentally and physically fit for service in the Air Force and there is no note in the service documents that he was suffering from any disease at the time of enrolment in Air Force. The diseases of the applicant were contracted during the service, hence they are attributable to and aggravated by Air Force Service. He pleaded that various Benches of Armed Forces Tribunal have granted disability element of disability pension in similar cases, as such the applicant be granted disability element of disability pension and its rounding off to 50%.

4. On the other hand, Ld. Counsel for the respondents contended that applicant was discharged from service on completion of terms of engagement after rendering 36 years of service. RMB assessed disability '**PRIMARY HYPERTENSION (OLD)**' and '**DIABETES MELLITUS TYPE-II-OLD**' as neither

attributable to nor aggravated by Air Force service with 40% disablement and NIL percentage of disability qualifying for disability pension for life. The disease has no casual connection to Air Force service. As such, under the provisions of Rule 153 of Pension Regulations for Indian Air Force 1961 (Part 1), his claim for disability pension has rightly been rejected by the respondents. The applicant is not entitled to disability element of disability pension as his disabilities are assessed as NANA. He submitted that the instant Original Application does not have any merit and the same is to be dismissed.

5. We have heard Ld. Counsel for the applicant as also Ld. Counsel for the respondents. We have also gone through the Release Medical Board proceedings as well as the records and we find that the questions which need to be answered are of two folds:-

- (a) Whether the disabilities of the applicant are attributable to or aggravated by Air Force Service?
- (b) Whether the applicant is entitled for the benefit of rounding off the disability element of disability pension?

6. The law on attributability of a disability has already been settled by the Hon'ble Supreme Court in the case of ***Dharamvir Singh Versus Union of India & Others***, reported in (2013) 7 Supreme Court Cases 316. In this case the Apex Court took note of the provisions of the Pensions Regulations, Entitlement Rules and

the General Rules of Guidance to Medical Officers to sum up the legal position emerging from the same in the following words.

"29.1. Disability pension to be granted to an individual who is invalided from service on account of a disability which is attributable to or aggravated by military service in non-battle casualty and is assessed at 20% or over. The question whether a disability is attributable to or aggravated by military service to be determined under the Entitlement Rules for Casualty Pensionary Awards, 1982 of Appendix II (Regulation 173).

29.2. A member is to be presumed in sound physical and mental condition upon entering service if there is no note or record at the time of entrance. In the event of his subsequently being discharged from service on medical grounds any deterioration in his health is to be presumed due to service [Rule 5 read with Rule 14(b)].

29.3. The onus of proof is not on the claimant (employee), the corollary is that onus of proof that the condition for non-entitlement is with the employer. A claimant has a right to derive benefit of any reasonable doubt and is entitled for pensionary benefit more liberally (Rule 9).

29.4. If a disease is accepted to have been as having arisen in service, it must also be established that the conditions of military service determined or contributed to the onset of the disease and that the conditions were due to the circumstances of duty in military service [Rule 14(c)]. [pic]

29.5. If no note of any disability or disease was made at the time of individual's acceptance for military service, a disease which has led to an individual's discharge or death will be deemed to have arisen in service [Rule 14(b)].

29.6. If medical opinion holds that the disease could not have been detected on medical examination prior to the acceptance for service and that disease will not be deemed to have arisen during service, the Medical Board is required to state the reasons

[Rule 14(b)]; and 29.7. It is mandatory for the Medical Board to follow the guidelines laid down in Chapter II of the Guide to Medical Officers (Military Pensions), 2002 - "Entitlement: General Principles", including Paras 7, 8 and 9 as referred to above (para 27)."

7. In view of the settled position of law on attributability, we find that the RMB has denied attributability to the applicant only by endorsing that the disabilities **PRIMARY HYPERTENSION** and **DIABETES MELLITUS TYPE-II-OLD** are neither attributable to nor aggravated (NANA) by service on the ground of onset of disabilities in Aug 2005 and Aug 2010 while posted in Peace location at Jorhat and Kanpur respectively, therefore, applicant is not entitled to disability element of disability pension. However, considering the facts and circumstances of the case, we are of the opinion that this reasoning of Release Medical Board for denying disability pension to applicant is not convincing and doesn't reflect the complete truth on the matter. Peace Stations have their own pressure of rigorous Air Force training and associated stress and strain of Air Force service. The applicant was enrolled in Indian Air Force on 25.05.1979 and the disabilities have been started after more than 25 years of Air Force service i.e. in Aug2005. We are therefore of the considered opinion that the benefit of doubt in these circumstances should be given to the applicant in view of ***Dharamvir Singh vs Union of India &Ors*** (supra), and the disability of the applicant should be considered as aggravated by Air Force service.

8. The law on the point of rounding off of disability pension is no more RES INTEGRA in view of Hon'ble Supreme Court judgment in the case of ***Union of India and Ors vs Ram Avtar &ors***(Civil appeal No 418 of 2012 decided on 10th December 2014). In this Judgment the Hon'ble Apex Court noded in disapproval of the policy of the Government of India in granting the benefit of rounding off of disability pension only to the personnel who have been invalidated out of service and denying the same to the personnel who have retired on attaining the age of superannuation or on completion of their tenure of engagement. The relevant portion of the decision is excerpted below:-

“4. By the present set of appeals, the appellant (s) raise the question, whether or not, an individual, who has retired on attaining the age of superannuation or on completion of his tenure of engagement, if found to be suffering from some disability which is attributable to or aggravated by the military service, is entitled to be granted the benefit of rounding off of disability pension. The appellant(s) herein would contend that, on the basis of Circular No 1(2)/97/D (Pen-C) issued by the Ministry of Defence, Government of India, dated 31.01.2001, the aforesaid benefit is made available only to an Armed Forces Personnel who is invalidated out of service, and not to any other category of Armed Forces Personnel mentioned hereinabove.

5. We have heard Learned Counsel for the parties to the lis.

6. We do not see any error in the impugned judgment (s) and order(s) and therefore, all the appeals which pertain to the concept of rounding off of the disability pension are dismissed, with no order as to costs.

7. *The dismissal of these matters will be taken note of by the High Courts as well as by the Tribunals in granting appropriate relief to the pensioners before them, if any, who are getting or are entitled to the disability pension.*

8. *This Court grants six weeks' time from today to the appellant(s) to comply with the orders and directions passed by us."*

9. It is also observed that claim for pension is based on continuing wrong and relief can be granted if such continuing wrong creates a continuing source of injury. In the case of **Shiv Dass vs. Union of India**, reported in 2007 (3) SLR445, Hon'ble Apex Court has observed:

"In the case of pension the cause of action actually continues from month to month. That, however, cannot be a ground to overlook delay in filing the petition. It would depend upon the fact of each case. If petition is filed beyond a reasonable period say three years normally the Court would reject the same or restrict the relief which could be granted to a reasonable period of about three years. The High Court did not examine whether on merit appellant had a case. If on merits it would have found that there was no scope for interference, it would have dismissed the writ petition on that score alone."

10. As such, in view of the decision of Hon'ble Supreme Court in the case of **Shiv Dass (supra)**, we are of the considered view that benefit of rounding off of disability pension @ 40% for life to be rounded off to 50% for life may be extended to the applicant from three years prior to filing of the original application.

11. In view of the above, the Original Application No. 1024 of 2022 deserves to be allowed, hence allowed. The impugned order, rejecting the applicant's claim for grant of disability element of disability pension, is set aside. The disabilities **PRIMARY HYPERTENSION and DIABETES MELLITUS TYPE-II-OLD** are held as aggravated by Air Force Service. The applicant is entitled to get disability element @40% for life which would be rounded off to 50% for life from three years prior to filing of the original application. The respondents are directed to grant disability element to the applicant @40% for life which would stand rounded off to 50% for life from three years prior to filing of the original application. Date of filing of O.A is 22.12.2022. The respondents are further directed to give effect to this order within a period of four months from the date of receipt of a certified copy of this order. Default will invite interest @ 8% per annum till the actual payment.

12. No order as to costs.

(Vice Admiral Atul Kumar Jain)
Member (A)

(Justice Ravindra Nath Kakkar)
Member (J)

Dated: 21st April, 2023
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